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Supreme Court, U.S.
FILED
SEP 25 2003
OFFICE OF THE CLERK

NO. 03-89

IN THE

Supreme Court of the United States

KIM SHEFFIELD, DOUGLAS HARIK, KYLE STAPLES, ROXANNA ESCALANTE, NANCÉ CONTRERAS, PATRICIA GUTHRIE, RAYMOND RICHARDSON, KAREN CHAVEZ,

Petitioners,

v.

LARRY ACEVES, in his official capacity as Superintendent, FRANKLIN MCKINLEY ELEMENTARY SCHOOL DISTRICT, *et al.*,

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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September 2003

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I. Issue I: Employer Liability—This Court's prior denial of *certiorari* on similar issues has no precedential value.

On the issue of public employer liability, neither the Respondent Superintendents nor the Respondent Unions offer any reason why this Court should deny *certiorari* other than that this Court has denied *certiorari* in the past.

Denial of *certiorari* indicates nothing about the underlying issues.[1] Many cases are granted review after other petitions presenting similar issues have been denied. In *Chicago Teachers Union v. Hudson* itself, this Court granted review only after the Court declined to review three cases presenting an identical issue. *See* 475 U.S. 292, 300 n.7 (1986). That the same issue returns to the Court suggests that the courts of appeals are unable to resolve the conflict among them, is a criterion that favors a grant of *certiorari*. *See* Sup. Ct. R. 10(a).

II. Issue II: Verification by Independent Auditor.

A. The issue for which review is sought is of sufficient importance to warrant this Court's review.

The Unions contend that whether this Court's requirement of verification by independent auditor applies to all unions that compel nonmembers to subsidize their activities "is not an important legal issue."[2] The appellate attorney who represented the Unions before the Ninth Circuit in this case made the opposite assertion to this Court in *Otto v. Pennsylvania State Educ. Ass'n,* 330 F.3d 125 (3d Cir. 2003), *petition for cert. filed*

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[1]*See* Robert L. Stern, *et al.*, *Supreme Court Practice* [hereinafter "Stern"], ¶ 5.7, pp. 306-11 (8th ed. 2002).

[2]Union Respondents' Opposition to Petition for Writ of Certiorari [hereinafter "Unions' Opp."] at 3.

sub nom. Shaler Educ. Ass'n v. Emory, No. 03-182 (docketed Aug. 1, 2003):

> Literally thousands of small local unions are seriously impacted by the decision of the Court below—either because they are directly bound by the Third Circuit's decision [in *Otto*], or because of the chilling effect that flows from the legal uncertainty engendered by the conflicting decisions of the Third and Ninth Circuits. It is urgent that this Court resolve that legal uncertainty by granting review to clarify *Hudson*'s disclosure requirements as applied to small local unions . . . ."

Otto Pet. at 21.

The Unions contend that "the amount at stake is extremely minor." Unions' Opp. at 18. From their perspective this is true. The Unions' interests are purely economic and the proportion of their revenues derived from nonmembers' agency fees is inconsequential. But from the fee payers' perspective, at issue are the first amendment rights of many thousands of nonunion employees whose rights are compromised by the Ninth Circuit's decision in this case. *Cf. Hudson*, 475 U.S. at 305 ("The amount at stake for each individual dissenter does not diminish the [First Amendment] concern.").

In addition, the Unions ignore the non-monetary costs now imposed on fee payers to verify the union's finances. As a result of the Ninth Circuit's ruling, each nonunion employee must now independently verify the union's expenditures—essentially duplicating one another's work—in order to obtain some assurance that the information received is reliable.[3]

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[3] *See* R. 82, Decl. of Irving B. Ross, CPA., at 18, ¶ 49:

(continued...)

B. The Ninth Circuit's decision was wrong.

1. Independent verification prevents excessive collections through third-party review.

The Unions contend that requiring the local unions to obtain an independent audit "would serve no discernible purpose." Unions' Opp. at 9. The Unions misstate the purpose of the independent verification requirement. The independent auditor provides assurance that the union spent the money the way it claims to have spent the money.[4] *Otto*, 330 F.3d at 130; *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 813 (9th Cir. 1997).

More important, the verified financial disclosure is issued contemporaneous with the commencement of involuntary agency fee withholding. *Hudson* held that the amount which

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[3](...continued)
By lifting from themselves the burden of establishing that their finances are trustworthy, the unions are simply enlarging that same burden and then transferring it to nonunion teachers. After this burden is enlarged and transferred to teachers, it is then multiplied. Permitting each nonunion teacher . . . to separately examine the union's accounting records would cause a potentially enormous disruption in the union's business.

[4]The Unions also contend that the verification requirement is unimportant because the real test of the union's chargeable agency fee occurs in the challenge proceedings before the independent fact finder. But under the CTA's procedures, a local union generally is not required to, and the DTA specifically did not, present any evidence of its own expenditures at the fact finding. The local unions relied upon the "local union presumption," *i.e.*, the local unions' ratios of chargeable and nonchargeable expenditures are presumed to be no less than that of the CTA. *See* Pet. App. at 42a-44a.

can initially be taken from nonunion employees' wages cannot be left completely to union officers. The problem in *Hudson* was that the entire agency fee collection procedures were in the union's hands.[5] In this case, as in *Hudson*, there was no pre-seizure external safeguard against excessive collection because the financial disclosure was solely the representation of union personnel. *See* Pet. App. at 41a, ¶ 9.

That is where the independent auditor verification fits into the *Hudson* equation. The independent auditor is required by first amendment due process,[6] because the auditor provides a neutral third-party protection from excessive and unlawful initial collection. The Unions' argument ignores this critical function the external audit required by *Hudson*.

Government cannot garnish or withhold money from wages to satisfy a debt to a labor union unless a pre-seizure hearing is provided or a neutral magistrate determines that the forced withholding is lawful.[7] By excising the "independent auditor" from *Hudson*'s rule, the Ninth Circuit eliminated the only pre-collection external control required by due process.[8]

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[5]475 U.S. at 308 ("the most conspicuous feature of the procedure is that from start to finish it is entirely controlled by the union, which is an interested party, since it is the recipient of the agency fees paid by the dissenting employees") (citation and internal quotation omitted).

[6]*Hudson* held that the requirements of due process were subsumed within its first amendment holding. 475 U.S. at 304 n.13.

[7]*See, e.g.*, *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 (1969) ("absent notice and a prior hearing . . . prejudgment garnishment . . . violates the fundamental principle of due process").

[8]The Ninth Circuit not only eliminated the "independent auditor" (continued...)

2. The Ninth Circuit's vague standard frustrates *Hudson* compliance.

Before the Ninth Circuit's decision in this case, *Hudson* provided a clear legal standard. Unions had to provide independently verified financial information to those from whom it demanded subsidy. The Ninth Circuit's new legal standard is no standard at all. What the Ninth Circuit requires is "flexible and creative 'auditor verifiable methodolog[ies]' appropriately tailored to provide . . . a reasonable opportunity for meaningful verification, without depleting the union's coffers . . . [that] is sufficiently reliable to ensure that a nonmember can independently verify that the union spent its money where it claimed that it did." Pet. App. at 11a.

The Ninth Circuit's new rule of law renders *Hudson* virtually unenforceable. Without the clearly defined legal standard set forth in *Hudson*, nonmembers can never know whether the financial disclosure and related verification is what

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[8](...continued)
requirement, as the *Otto* Court recognized, 330 F.3d at 132, but also approved the precise procedure this Court held failed to "provide an adequate explanation for the advance reduction of dues," *Hudson*, 475 U.S. at 309.

In *Hudson*, the union had invited Ms. Hudson to review the union's financial records. Nonetheless, this Court held that a union must provide "an adequate explanation of the basis of the fee," *id.* at 310, and that "adequate disclosure surely would include verification by an independent auditor." *Id.* at 307 n.18. The appropriately justified advance reduction . . . [is] necessary to minimize both the impingement [on nonmembers' First "Amendment interests] and the burden." *Id.* "The nonmembers 'burden' is simply the obligation to make his objections known." *Id.* at 306 n.16.

they are due.[9] Accordingly, the risks of litigation for any agency fee payer are simply too great given the limited amount at stake.

3. The Unions' contentions regarding the economic burden of compliance with *Hudson*'s requirements are superficial.

The Unions contend that the verification requirement presents an undue economic burden because the auditor's fee exceeds the amount of agency fees collected. They simultaneously speculate that a union's decision to forego an audit and the concomitant inability to collect agency fees will result in a mass exodus from the union.[10] However, as the Unions concede, Unions' Opp. at 6-7 n.2, the local union's portion of the agency fee is a small component of the total agency fee, insufficient to motivate members to resign.

Moreover, it is analytically unsound to consider the economic wherewithal of only the local union when assessing the economic burden of complying with *Hudson*'s requirements. Local teachers unions are a part of a three-level organization that includes the CTA and the NEA. The local union collects revenues not only for itself but also for the CTA and NEA. The

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[9]The Unions do not know either, but they will just take the money and see if someone complains, and, if forced to, stop taking money from that individual, but continue taking it from everyone else. The Ninth Circuit's new rule is a formula for continued resistance to this Court's mandate in *Hudson*.

[10]The two contentions are inconsistent. A substantial increase in the number of nonmembers will affect the cost-benefit equation as to whether to retain the services of an independent auditor. The problem that the Unions fear, is self-correcting.

local union, in turn, delegates to these affiliates a substantial portion of its bargaining agent statutory obligations.

For each bargaining unit member, the local sends annually to the CTA and the NEA $530,[11] while the local retains between $5 and $299, with most locals retaining approximately $125.[12] If nonmembers must subsidize the CTA's and NEA's treasuries, it is only fair that the local union tap those same resources to discharge the constitutional obligations incident to exacting these agency fees. *See Otto*, 330 F.3d at 135. This Court permits local unions to charge nonunion employees for activities that benefit other bargaining units represented by affiliated local unions on the rationale that "[t]he essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable *economic*, political, and informational resources ***when the local is in need of them***." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 523 (1991) (emphasis added).

Verification by independent auditor is the price unions must pay for the extraordinary privilege (enforced by the government) of taking money from those who do not wish to join their cause. Fairness requires that, as a precondition to the seizure of agency fees, unions provide independently verified disclosure of how they use that money. "Indeed, the union triggers no disclosure [or audit] requirement until it voluntarily seeks to collect service fees from the non-union members." *Tierney v. City of Toledo*, 824 F.2d 1497, 1503 n.2 (6th Cir. 1987).

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[11]*See* R. 59, Decl. of Stephanie Minkin, at 2 (CTA takes $416 and NEA takes $114 for each individual represented by a local).

[12]*See* R. 64, Decl. of Loretta Doon.

C. The Ninth Circuit's decision conflicts with this Court's decision in *Hudson*.

The *Hudson* Court balanced the statutory rights of labor unions with nonmembers' constitutional rights by requiring audited financial disclosure and other procedural safeguards as a condition of agency fee collection. The Court noted that "'[b]y allowing the union shop at all, we have already countenanced a significant impingement on [the nonmembers'] First Amendment rights.'" 475 U.S. at 301 n.8 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)). Verification by independent auditor is necessary to balance the equation. The Ninth Circuit disturbed that careful balance and, essentially, placed the union's economic concerns on the scale twice: once to permit agency shop, and a second time to reduce the procedural safeguards required to protect nonmembers' first amendment rights.

1. The Ninth Circuit reallocated the burden of expense verification from the union to the nonmember in contravention of *Hudson*.

Neither the Unions in this case nor the NEA-affiliated union counterparts in *Otto* dispute the central rationale underpinning the Third Circuit's rejection of the Ninth Circuit's holding in this case. *Hudson* placed the burden of expense verification on the union, not the nonmember. *See Hudson*, 475 U.S. at 306 & n.16 ("The nonmember's burden is simply the obligation to make his objection known."). However, the Ninth Circuit here "shifted the burden of expense verification from the union to the nonmember." *Otto*, 330 F.3d at 131.

2. *Hudson*'s independent verification requirement applies to all unions, not just the union in *Hudson*.

The Unions suggest (Unions' Opp. at 6) that *Hudson*'s unambiguous mandate was directed only to the union defendant in that case. The Unions base this extraordinary position on the *Hudson* Court's use of the word "union" with a capital "U" in footnote 18.[13] However, the Court used the capital "U" throughout *Hudson*. Thus, the Unions' logic would require that all of the procedural requirements set forth in *Hudson* apply only to the union defendant in that case.

The Court rarely grants *certiorari* or writes opinions on legal issues that are of interest only to the litigants before it. *See* Stern, § 4.11 at 244. Not only did the *Hudson* Court say nothing to suggest that its holding was limited to the union in that case, but the Court indicated that it granted *certiorari* to address "the divergent approaches of other courts to the issue" in cases involving other unions. 475 U.S. at 300 n.7. The *Hudson* Court, thus, was cognizant that in announcing the audit requirement it was stating a generally applicable rule.[14]

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[13]Contrary to the Unions' suggestion, the Court's discussion of the independent auditor's role is not limited to note 18. In discussing the escrow requirement, *Hudson* uses the terms "verification" and "audit" interchangeably, *see, e.g.*, 475 U.S. at 310 n.22, and indicates that the verification is to be performed by a certified public accountant, *id.*

[14]The unions further contend that, because the union's notice at issue in *Hudson* contained constitutional defects in addition to its failure to provide verification by independent auditor, the Court's holding as to the independent auditor requirement is mere dictum and

(continued...)

3. No further development on this legal issue is foreseeable.

Contrary to the Unions' assertion (Unions' Opp. at 16 & n.9), there is no reason for the Court to await development of a judicial consensus before it exercises its jurisdiction. Until the Ninth Circuit's decision in this case, the consensus had already developed that this Court meant what it said when it required independent verification.

In every prior public-sector case litigated in federal court, the court rejected the union's attempt to satisfy its *Hudson* obligations with something other than financial information verified by independent auditor. *See* cases cited Pet. at 18-19. All that remains to be decided in the circuits which have not yet addressed this issue is whether to follow the Third or Ninth Circuits. Judicial adoption of either precedent will add nothing to the development of the underlying issue, which should be resolved now. Because this case and *Otto (filed sub nom. Shaler Educ. Ass'n v. Emory)*, No. 03-182 present the same issue, the Court should conference the two cases together and grant *certiorari* in both.

Respectfully submitted,

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September 2003

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[14](...continued)
can be disregarded. Unions' Opp. at 16 n.9. This is a ***non sequitur***. The independent auditor requirement was part of *Hudson*'s holding explaining the union's failure to meet its disclosure obligations incident to agency fee withholding. *See* 475 U.S. at 306-07 & n.18. No court decision even hints that this language is dictum.